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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
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9 EZRA J. SCOTT,

10 Plaintiff,

11 v.

12 CAROLYN W. COLVIN, Acting
13 Commissioner of Social Security,

14 Defendant.

15 NO. C14-822-MJP-JPD

16 REPORT AND
17 RECOMMENDATION

18 Plaintiff Ezra J. Scott appeals the final decision of the Commissioner of the Social
19 Security Administration (“Commissioner”) which denied his application for Disability
20 Insurance Benefits (“DIB”) under Title II of the Social Security Act, 42 U.S.C. §§ 401-33,
21 after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below,
22 the Court recommends that the Commissioner’s decision be reversed and remanded for further
23 administrative proceedings.

24 I. FACTS AND PROCEDURAL HISTORY

25 At the time of his date last insured, plaintiff was a 33 year old man with a high school
26 education and some college. Administrative Record (“AR”) at 35, 127, 131. His past work
27 experience includes employment as a job analyst. AR at 35. Plaintiff was last gainfully
28 employed in 2006. AR at 130-38.

On July 29, 2011, plaintiff filed an application for DIB, alleging an onset date of June 1, 2006. AR at 127-29. Plaintiff later requested to amend his alleged disability onset date to January 1, 2008. AR at 32, 239. Plaintiff asserts that he is disabled due to fibromyalgia, irritable bowel syndrome, migraine headaches, and cognitive difficulties. AR at 142.

The Commissioner denied plaintiff's claim initially and on reconsideration. AR at 74-76, 78-79. Plaintiff requested a hearing which took place on December 13, 2012. AR at 26-60. On January 9, 2013, the ALJ issued a decision finding plaintiff not disabled and denied benefits based on a finding that plaintiff did not have a severe physical or mental impairment. AR at 7-25. Plaintiff's administrative appeal of the ALJ's decision was denied by the Appeals Council, AR at 1-5, making the ALJ's ruling the "final decision" of the Commissioner as that term is defined by 42 U.S.C. § 405(g). On June 5, 2014, plaintiff timely filed the present action challenging the Commissioner's decision. Dkt. 1.

II. JURISDICTION

Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. § 405(g).

III. STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits when the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,

1 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a
2 whole, it may neither reweigh the evidence nor substitute its judgment for that of the
3 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is
4 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that
5 must be upheld. *Id.*

6 The Court may direct an award of benefits where "the record has been fully developed
7 and further administrative proceedings would serve no useful purpose." *McCartey v.*
8 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292
9 (9th Cir. 1996)). The Court may find that this occurs when:

10 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the
11 claimant's evidence; (2) there are no outstanding issues that must be resolved
12 before a determination of disability can be made; and (3) it is clear from the
record that the ALJ would be required to find the claimant disabled if he
considered the claimant's evidence.

13 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that
14 erroneously rejected evidence may be credited when all three elements are met).

15 IV. EVALUATING DISABILITY

16 As the claimant, Mr. Scott bears the burden of proving that he is disabled within the
17 meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th
18 Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in
19 any substantial gainful activity" due to a physical or mental impairment which has lasted, or is
20 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§
21 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if his impairments are
22 of such severity that he is unable to do his previous work, and cannot, considering his age,
23 education, and work experience, engage in any other substantial gainful activity existing in the
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1 national economy. 42 U.S.C. § 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-
2 99 (9th Cir. 1999).

3 The Commissioner has established a five step sequential evaluation process for
4 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §
5 404.1520. The claimant bears the burden of proof during steps one through four. At step five,
6 the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at any step in
7 the sequence, the inquiry ends without the need to consider subsequent steps.

8 Step one asks whether the claimant is presently engaged in “substantial gainful
9 activity.” 20 C.F.R. § 404.1520(b).¹ If he is, disability benefits are denied. If he is not, the
10 Commissioner proceeds to step two. At step two, the claimant must establish that he has one
11 or more medically severe impairments, or combination of impairments, that limit his physical
12 or mental ability to do basic work activities. If the claimant does not have such impairments,
13 he is not disabled. 20 C.F.R. § 404.1520(c). If the claimant does have a severe impairment,
14 the Commissioner moves to step three to determine whether the impairment meets or equals
15 any of the listed impairments described in the regulations. 20 C.F.R. § 404.1520(d). A
16 claimant whose impairment meets or equals one of the listings for the required twelve-month
17 duration requirement is disabled. *Id.*

18 When the claimant’s impairment neither meets nor equals one of the impairments listed
19 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s
20 residual functional capacity (“RFC”). 20 C.F.R. § 404.1520(e). Here, the Commissioner
21 evaluates the physical and mental demands of the claimant’s past relevant work to determine

22 _____
23 ¹ Substantial gainful activity is work activity that is both substantial, i.e., involves
24 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §
404.1572.

whether he can still perform that work. 20 C.F.R. § 404.1520(f). If the claimant is able to perform his past relevant work, he is not disabled; if the opposite is true, then the burden shifts to the Commissioner at step five to show that the claimant can perform other work that exists in significant numbers in the national economy, taking into consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. § 404.1520(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the claimant is unable to perform other work, then the claimant is found disabled and benefits may be awarded.

V. DECISION BELOW

On January 9, 2013, the ALJ issued a decision finding the following:

1. The claimant last met the insured status requirements of the Social Security Act on December 31, 2010.
 2. The claimant did not engage in substantial gainful activity during the period from his alleged onset date of June 1, 2006 through the date last insured of December 31, 2010.
 3. Through the date last insured, the claimant had the following medically determinable impairment: fibromyalgia.
 4. Through the date last insured, the claimant did not have an impairment or combination of impairments that significantly limited the ability to perform basic work-related activities for 12 consecutive months; therefore, the claimant did not have a severe impairment or combination of impairments.
 5. The claimant was not under a disability, as defined in the Social Security Act, at any time from June 1, 2006, the alleged onset date, through December 31, 2010, the date last insured.

AR at 12-30.

VI. ISSUES ON APPEAL

As identified in plaintiff's Opening Brief, the principal issues on appeal are:

1. Whether the ALJ properly evaluated the Mr. Scott's credibility;
 2. Whether the ALJ properly evaluated the opinions of treating physician Erik Suh, M.D.;

- 1 3. Whether the ALJ properly evaluated the opinions of treating rheumatologist
2 John Baldwin, M.D.; and
- 3 4. Whether the ALJ properly evaluated the lay witness evidence.

Dkt. No. 11 at 1.

4 VII. DISCUSSION

5 The ALJ found at step two of the sequential disability evaluation process that plaintiff's
6 fibromyalgia is a medically determinable impairment. AR at 12-14. Following a review of the
7 evidence, the ALJ further concluded that plaintiff's fibromyalgia does not significantly limit
8 plaintiff's ability to perform basic work activities and, therefore, is not a severe impairment.
9 AR at 14-20. Because plaintiff does not have a severe impairment, the ALJ concluded that
10 plaintiff is not disabled under the Act. AR at 20.

11 This Court agrees that plaintiff's fibromyalgia is a medically determinable impairment
12 and affirms this finding. However, for the reasons discussed in the subsequent sections, the
13 Court finds that the remainder of the ALJ's decision in this claim is based on legal error and
14 not supported by substantial evidence in the record and should be reversed.

15 A. The ALJ's Assessment of Plaintiff's Credibility

16 Plaintiff argues that the ALJ erred in evaluating his credibility. Dkt. 11 at 1-9. Here,
17 the ALJ rejected plaintiff's testimony because plaintiff's alleged symptoms and limitations are
18 not consistent with the overall record. AR at 17. In conjunction with this finding, the ALJ
19 identified a number of apparent inconsistencies, including a lack of objective medical evidence
20 support for plaintiff's symptom complaints. AR at 17-18.

21 Defendant argues that the ALJ "reasonably evaluated all of the evidence in the record
22 and found that there was no credible or persuasive evidence of any significant work-related
23 limitations during the relevant period." Dkt. 12 at 2-10. The Commissioner does not,
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1 however, defend all of the reasons offered by the ALJ to discredit plaintiff's testimony. Dkt.
2 12 at 2-10. In so doing, defendant effectively concedes that some of the reasons offered by the
3 ALJ are legal error and not supported by substantial evidence. For this reason, the Court
4 specifically addresses only those reasons defended by the Commissioner in her brief. The
5 Court finds, however, that all of the reasons offered by the ALJ are legally insufficient to
6 properly reject plaintiff's testimony and should be reversed.

7 As noted above, credibility determinations are within the province of the ALJ's
8 responsibilities, and will not be disturbed, unless they are not supported by substantial
9 evidence. A determination of whether to accept a claimant's subjective symptom testimony
10 requires a two-step analysis. 20 C.F.R. § 404.1529; *Smolen*, 80 F.3d at 1281; SSR 96-7p.
11 First, the ALJ must determine whether there is a medically determinable impairment that
12 reasonably could be expected to cause the claimant's symptoms. 20 C.F.R. § 404.1529(b);
13 *Smolen*, 80 F.3d at 1281-82; SSR 96-7p. Once a claimant produces medical evidence of an
14 underlying impairment, the ALJ may not discredit the claimant's testimony as to the severity
15 of symptoms solely because they are unsupported by objective medical evidence. *Bunnell v.*
16 *Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991) (en banc); *Reddick v. Chater*, 157 F.3d 715, 722
17 (9th Cir. 1988). Absent affirmative evidence showing that the claimant is malingering, the
18 ALJ must provide "clear and convincing" reasons for rejecting the claimant's testimony.
19 *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at 722.

20 When evaluating a claimant's credibility, the ALJ must specifically identify what
21 testimony is not credible and what evidence undermines the claimant's complaints; general
22 findings are insufficient. *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at 722. The ALJ may
23 consider "ordinary techniques of credibility evaluation" including a reputation for truthfulness,
24 inconsistencies in testimony or between testimony and conduct, daily activities, work record,

1 and testimony from physicians and third parties concerning the nature, severity, and effect of
2 the symptoms of which he complains. *Smolen*, 80 F.3d at 1284; *see also Light v. Social Sec.*
3 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

4 As a threshold matter, to the extent the Commissioner contends that the applicable
5 standard of review does not require the ALJ to provide “clear and convincing” reasons for
6 rejecting a claimant’s testimony, this argument is foreclosed. Dkt. 12 at 6. As discussed
7 above, the Ninth Circuit requires this Court in reviewing an ALJ’s treatment of a claimant’s
8 testimony to apply the following standard: “If there is no evidence of malingering, the ALJ
9 may reject the claimant’s testimony about the severity of the symptoms only by making
10 specific findings stating clear and convincing reasons for doing so.” *Smolen*, 80 F.3d at 1283–
11 84; *see also Swenson v. Sullivan*, 876 F.2d 683, 687 (9th Cir. 1989); *Dodrill v. Shalala*, 12
12 F.3d 915, 918 (9th Cir. 1993).

13 Moreover, the Ninth Circuit recently denied the Commissioner’s attempts to undermine
14 the clear and convincing standard, stating the suggestion “lacks any support in precedent and
15 must be rejected.” *See Garrison v. Colvin*, 759 F.3d 995, 1015 n. 18 (9th Cir. 2014) (rejecting
16 the Commissioner’s argument that the Court should apply a standard lower than clear and
17 convincing in reviewing ALJ’s evaluation of claimant’s testimony where there was no
18 evidence of malingering). This Court is bound by the law of the Ninth Circuit. Accordingly,
19 because the ALJ did not find malingering, the Court finds that, in discounting plaintiff’s
20 testimony, the ALJ was required to provide clear and convincing reasons that are supported by
21 substantial evidence.

22 Turning now to the substance of the ALJ decision, in assessing the severity of
23 plaintiff’s fibromyalgia, the ALJ notes that despite plaintiff’s allegations of debilitating
24 symptoms, all objective testing is normal. AR at 14. The ALJ then rejects plaintiff’s symptom

1 testimony because it is not consistent with the overall record, which indicates that plaintiff's
2 doctors recommended that plaintiff engage in regular modest exercise and that no independent
3 gastrointestinal impairment is established by the medical record. AR at 17-18. The ALJ
4 further reasons that plaintiff has destructive sleep patterns and that plaintiff's mental
5 difficulties may be explained by "over medicating". AR at 18.

6 As noted above, the Commissioner does not specifically defend all of these reasons.
7 Instead, defendant argues generally that the ALJ provided sufficient reasons supported by
8 substantial evidence in the record to find plaintiff's complaints not credible, "[m]ost
9 importantly, no medical source opinion identified any specific functional limitation" during the
10 period of time in which plaintiff was insured for purposes of DIB benefits. Dkt. 12 at 4. The
11 Court notes, however, that the ALJ offered this reason to reject the opinion of plaintiff's
12 treating rheumatologist John Baldwin, M.D., and not plaintiff's own testimony. *See* AR at 16-
13 18. According to the Ninth Circuit, "[l]ong-standing principles of administrative law require
14 us to review the ALJ's decision based on the reasoning and actual findings offered by the
15 ALJ—not post hoc rationalizations that attempt to intuit what the adjudicator may have been
16 thinking." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1225-26 (9th Cir. 2009) (citing
17 *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (other citation omitted)); *see also Molina v.*
18 *Astrue*, 674 F.3d 1104, 1121 (9th Cir. 2012) ("we may not uphold an agency's decision on a
19 ground not actually relied on by the agency") (citing *Chenery Corp.*, 332 U.S. at 196). As
20 such, the Court does not find defendant's first argument persuasive.

21 Defendant further argues that the ALJ gave several other reasons supported by
22 substantial evidence to find plaintiff's testimony not credible, including that: (1) despite
23 plaintiff's allegations of debilitating symptoms, the results of all objective testing are normal;
24 (2) plaintiff failed to undergo a sleep center evaluation for his alleged insomnia, as

1 recommended by Dr. Baldwin, plaintiff's rheumatologist; (3) plaintiff's testimony is
2 inconsistent with plaintiff's doctors' recommendations that he engage in regular exercise; and
3 (4) that the treatment record reflects that plaintiff received almost no mental health treatment.
4 Dkt. 12 at 6-8. The Court is not persuaded by defendant's additional arguments.

5 In discussing plaintiff's testimony, the ALJ repeatedly points to the lack of objective
6 testing to support the severity of plaintiff's symptom complaints. *See AR at 14* (noting that
7 “[d]espite [plaintiff's] allegations of debilitating symptoms, all objective testing was normal”
8 and citing normal findings on electromyography (EMG) testing, nerve conduction (NVC)
9 testing, electroencephalogram (EEG) testing, computed tomography (CT) scanning, and blood
10 tests for autoimmune reactions), 15 (citing an unremarkable neurological examination and
11 normal EMG and NVC studies), 15 (noting lack of abnormal findings documented by
12 plaintiff's treating physician Erik Suh, M.D.), 16 (noting lack of documentation of objective
13 examination or clinical findings by plaintiff's treating physician Scott Tyler, M.D.), 16 (noting
14 lack of objective findings documented by plaintiff's rheumatologist John Baldwin, M.D.), 17
15 (noting unremarkable endoscopy and colonoscopy findings).

16 This rationale fails in the context of the ALJ's finding that plaintiff's fibromyalgia is a
17 medically determinable impairment. Here, the ALJ based this finding on the American
18 College of Rheumatology Preliminary Diagnostic Criteria, which requires the exclusion of
19 other co-occurring conditions that could also be the cause of an individual's symptoms before a
20 diagnosis can be made. *See AR at 12-13* (finding fibromyalgia to be a medically determinable
21 impairment based on plaintiff's (1) a history of widespread pain, (2) repeated manifestations of
22 six or more symptoms, signs, or co-occurring conditions, and (3) evidence that other disorders
23 that could cause these repeat manifestations of symptoms, signs, or co-occurring conditions
24 were excluded); *see also* SSR 12-2p. In making the finding that plaintiff's fibromyalgia is a

1 medically determinable impairment, the ALJ noted that the normal neurological findings
2 documented by Dr. Baldwin excluded such co-occurring conditions. AR at 12-13. The
3 ALJ's use of the clinical findings necessary to exclude other diagnoses and support a diagnosis
4 of fibromyalgia to discredit a claimant's testimony regarding the limitations caused by
5 fibromyalgia defies logic.

6 Fibromyalgia is a disease that is notable for its lack of objective diagnostic techniques.
7 See *Sarchet v. Chater*, 78 F.3d 305, 306 (7th Cir.1996). Specifically, the Ninth Circuit has
8 recognized that “[fibromyalgia]’s cause or causes are unknown, there is no cure, and, of
9 greatest importance to disability law, its symptoms are entirely subjective. There are no
10 laboratory tests for the presence or severity of fibromyalgia.” *Rollins v. Massanari*, 261 F.3d
11 853, 855 (9th Cir.2001) (quoting *Sarchet*, 78 F.3d at 306). Put differently, “the absence of
12 swelling joints or other orthopedic and neurologic deficits ‘is no more indicative that the
13 patient’s fibromyalgia is not disabling than the absence of a headache is an indication that a
14 patient’s prostate cancer is not advanced.’” *Green–Younger v. Barnhart*, 335 F.3d 99, 109 (2d
15 Cir.2003) (quoting *Sarchet*, 78 F.3d at 307). Indeed, such negative findings are necessary to
16 make a diagnosis of fibromyalgia in some cases. See SSR 12-2p. For these reasons, the ALJ’s
17 rejection of plaintiff’s testimony due to a lack of objective findings is not a clear and
18 convincing reason supported by substantial evidence in the record. *Smolen*, 80 F.3d at 1284;
19 *Reddick*, 157 F.3d at 722; see also *Bunnell*, 947 F.2d 3at 343 (once a claimant produces
20 medical evidence of an underlying impairment, the ALJ may not discredit the claimant’s
21 testimony as to the severity of symptoms solely because they are unsupported by objective
22 medical evidence).

23 Defendant next argues that plaintiff’s failure to undergo a sleep center evaluation for
24 his alleged insomnia is a legally sufficient reason to reject plaintiff’s testimony because

1 unexplained or inadequately explained failure to seek treatment or follow a prescribed course
 2 of treatment is a clear and convincing reason to question a claimant's credibility. Dkt. 12 at 7
 3 (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); Social Security Ruling ("SSR") 96-
 4 7p). Although this rationale is recognized by the 9th Circuit, the Court notes that the ALJ does
 5 not identify this as a reason to reject plaintiff's testimony. *See Bray*, 554 F.3d at 1225-26
 6 (regarding post hoc rationalization). Rather, the ALJ merely references the lack of a sleep
 7 center evaluation when discussing Dr. Baldwin's treatment notes. AR at 16. Furthermore,
 8 even if the ALJ had offered this reason to reject plaintiff's testimony, substantial evidence does
 9 not support that plaintiff failed to seek treatment or failed to follow prescribed treatment for
 10 sleep difficulties. To the contrary, the record supports that plaintiff was diagnosed and treated
 11 by Dr. Suh for insomnia. *See* AR at 312, 318-19, 326-27, 329, 467, 469, 476-77. Dr. Tyler
 12 also diagnosed and treated plaintiff for insomnia. *See* AR at 354-55, 356-61, 364, 388.
 13 Defendant points to no evidence in the record, and this Court's own review of the record
 14 reveals no evidence that indicates plaintiff failed to follow the treatment recommendations of
 15 his doctors for insomnia or other sleep difficulties.

16 Additionally, as plaintiff points out, the record indicates that Dr. Baldwin's
 17 recommendation regarding a sleep study is equivocal and may not have been ever
 18 communicated to plaintiff. Dr. Baldwin wrote: "If these [blood tests] are normal then I think
 19 before making a diagnosis of fibromyalgia [plaintiff] should see a neurologist and maybe even
 20 have a sleep study. Once his lab is back we will get together with him and make my final
 21 recommendation." AR at 412. Hence, the fact that plaintiff did not undergo a sleep center
 22 study is not a legally sufficient basis to reject plaintiff's testimony.

23 Defendant also argues that the ALJ properly rejected plaintiff's testimony because
 24 plaintiff's claim that his body was "exercise averse" was in "stark contrast" to plaintiff's

1 doctors' recommendations that he engage in regular exercise. Dkt. 12 at 7-8 (citing AR at 17,
2 41, 356-7, 491). Defendant cites no legal authority to support this position. Nor does
3 defendant cite to any evidence in the record that would indicate plaintiff's functional capacity
4 is greater than he alleges. Rather, defendant argues that because plaintiff's pain is not a
5 medically determinable impairment, the ALJ was not required to consider its severity
6 separately from plaintiff's fibromyalgia. Dkt. 12 at 7-8. This Court does not find defendant's
7 position persuasive.

8 Plaintiff's statements regarding his diminished physical capacity are not inconsistent
9 with his doctors' recommendations that he engage in regular modest exercise as part of his
10 treatment for fibromyalgia. Further, to the extent that the ALJ rejects plaintiff's testimony
11 regarding his diminished physical capacity as inconsistent with plaintiff's report in September
12 2008 that he was able to walk 30 to 45 minutes per day, this is not a clear and convincing
13 reason supported by substantial evidence in the record. *See Smolen*, 80 F.3d at 1284; *Reddick*,
14 157 F.3d at 722. Although the Ninth Circuit has recognized "two grounds for using daily
15 activities to form the basis of an adverse credibility determination," either, they can "meet the
16 threshold for transferable work skills," or, they can "contradict [the claimant's] other
17 testimony", neither ground is met here. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007).
18 Plaintiff's report to his doctor in 2008 that he was able to walk 30 to 45 minutes per day does
19 not meet the threshold for transferable work skills nor does it contradict plaintiff's other
20 testimony. *See e.g.* AR at 41-42 (explaining attempts to engage in regular exercise).

21 As plaintiff points out, the Ninth Circuit has held that limited walking for exercise does
22 not detract from a claimant's credibility as to his overall disability. *Vertigan v. Halter*, 260
23 F.3d 1044, 1050 (9th Cir. 2001) (noting that although a claimant may engage in activities for
24 therapeutic reasons despite pain "that does not mean that [he] could concentrate on work

1 despite the pain or could engage in similar activity for a longer period given the pain
2 involved") (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)). Moreover, by not
3 defending this reason in her brief, the Commissioner concedes that the ALJ's assessment of
4 this evidence is an error.

5 Defendant also argues that the ALJ properly rejected plaintiff's testimony regarding his
6 mental difficulties because the treatment record reflects that plaintiff received almost no mental
7 health treatment. Dkt. 12 at 8-9 (citing *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005)
8 (ALJ properly discredited a claimant's testimony regarding depression and fatigue because she
9 did not seek any treatment or evaluation)). In contrast to the claimant in *Burch*, however, the
10 record before this Court supports that plaintiff sought treatment for *all* of his fibromyalgia
11 related symptoms, including cognitive difficulties. *See e.g.* AR at 318 (seeking treatment for
12 memory loss/poor memory), 321 (seeking treatment for forgetfulness), 331 (seeking treatment
13 for anxiety), 333 (seeking treatment for his emotional state), 336 (seeking treatment for
14 memory loss, blank stares, and depression), 340 (seeking treatment for mental issues including
15 forgetfulness and lack of concentration and alertness), 342 (seeking treatment for difficulty
16 with concentration), 350 (seeking treatment for difficulties with focus), 364 (seeking treatment
17 for confusion and difficulties thinking straight), 374-75 (seeking treatment for mood swings,
18 anxiety, tearfulness, and low motivation), 410 (seeking treatment for trouble thinking clearly
19 and decline in cognitive ability), 412 (seeking treatment for trouble thinking clearly).

20 Defendant points to no evidence, and this Court's review of the record identifies no
21 evidence that plaintiff was ever advised by his doctors to engage in a course of mental health
22 treatment separate from his treatment for fibromyalgia. Moreover, in finding that plaintiff's
23 fibromyalgia is a medically determinable impairment, the ALJ recognizes plaintiff's reported
24 mental difficulties as part of the constellation of signs, symptoms, and co-occurring disorders

1 necessary for a valid diagnosis of fibromyalgia under the American College of Rheumatology
2 criteria. *See* AR at 12 (“While there is no indication of specific tender points, the record does
3 demonstrate symptoms including fatigue, waking unrefreshed, anxiety, diarrhea, insomnia, etc.
4 *See e.g.* Ex. 4F”) (citing AR at 290-343 (documenting a variety of mental symptoms typical of
5 fibromyalgia including memory difficulties, anxiety, depression, and lack of concentration and
6 alertness)); *see also* SSR 12-2p. For these reasons, the ALJ’s rejection of plaintiff’s symptom
7 testimony because plaintiff did not seek mental health treatment in addition to the treatment he
8 received for fibromyalgia is not a clear and convincing reason supported by substantial
9 evidence in the record. *See Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at 722. As such, the
10 ALJ’s assessment of plaintiff’s credibility is reversed and remanded for further administrative
11 proceedings.

12 B. The ALJ’s Assessment of the Medical Evidence

13 Plaintiff next argues that the ALJ erred by rejecting the medical opinions of his treating
14 physician Erik Suh, M.D., and treating rheumatologist John Baldwin, M.D. Dkt. 11 at 9-13.
15 It is notable that the ALJ rejects *all* of the medical opinions in the record offered by the
16 physicians who have firsthand knowledge of plaintiff’s condition. AR at 14-16. Dr. Suh
17 opined plaintiff is not able to carry out a conversation for any length of time, not able to stand
18 or carry any objects for more than one hour, frequently has short term memory loss, and is not
19 able to focus or concentrate sufficiently to hold down a job. AR at 480. Dr. Baldwin opined
20 plaintiff is disabled due to symptoms from fibromyalgia and that plaintiff’s irritable bowel
21 syndrome is also quite disabling. AR at 411.

22 The ALJ does not find these medical opinions persuasive. AR at 15-16. Instead, the
23 ALJ relies on the opinion of the non-examining state agency physician, who concludes that the
24 medical record supports no more than minimal functional limitations, to find that plaintiff’s

1 fibromyalgia is not severe. AR at 14 (citing AR 68-73). Defendant argues that the ALJ
2 reasonably discounted the opinions of plaintiff's treating sources. Dkt. 12 at 10-16. This
3 Court disagrees. The ALJ's treatment of this evidence is inconsistent with the legal standards
4 set forth in *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007), and should be reversed.

5 As a matter of law, more weight is given to a treating physician's opinion than to that
6 of a non-treating physician because a treating physician "is employed to cure and has a greater
7 opportunity to know and observe the patient as an individual." *Magallanes v. Bowen*, 881 F.2d
8 747, 751 (9th Cir. 1989); *see also Orn*, 495 F.3d at 631. A treating physician's opinion,
9 however, is not necessarily conclusive as to either a physical condition or the ultimate issue of
10 disability, and can be rejected, whether or not that opinion is contradicted. *Magallanes*, 881
11 F.2d at 751. If an ALJ rejects the opinion of a treating or examining physician, the ALJ must
12 give clear and convincing reasons for doing so if the opinion is not contradicted by other
13 evidence, and specific and legitimate reasons if it is. *Reddick v. Chater*, 157 F.3d 715, 725
14 (9th Cir. 1988). "This can be done by setting out a detailed and thorough summary of the facts
15 and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Id.*
16 (citing *Magallanes*, 881 F.2d at 751). The ALJ must do more than merely state his/her
17 conclusions. "He must set forth his own interpretations and explain why they, rather than the
18 doctors', are correct." *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).
19 Such conclusions must at all times be supported by substantial evidence. *Reddick*, 157 F.3d at
20 725.

21 The opinions of examining physicians are to be given more weight than non-examining
22 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Like treating physicians, the
23 uncontradicted opinions of examining physicians may not be rejected without clear and
24 convincing evidence. *Id.* An ALJ may reject the controverted opinions of an examining

1 physician only by providing specific and legitimate reasons that are supported by the record.

2 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

3 Opinions from non-examining medical sources are to be given less weight than treating
4 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the
5 opinions from such sources and may not simply ignore them. In other words, an ALJ must
6 evaluate the opinion of a non-examining source and explain the weight given to it. SSR 96-6p,
7 1996 WL 374180, at *2. Although an ALJ generally gives more weight to an examining
8 doctor's opinion than to a non-examining doctor's opinion, a non-examining doctor's opinion
9 may nonetheless constitute substantial evidence if it is consistent with other independent
10 evidence in the record. *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Orn*, 495 F.3d
11 at 632-33.

12 As a threshold matter, to the extent the Commissioner contends that the applicable
13 standard of review does not require the ALJ to provide "clear and convincing" or "specific and
14 legitimate" reasons supported by substantial evidence to reject the opinion of a treating
15 physician, this Court disagrees. See *Lester*, 81 F.3d at 830. As discussed previously, the Ninth
16 Circuit recently denied the Commissioner's attempts to undermine the clear and convincing
17 standard in the context of a claimant's credibility assessment, stating the suggestion "lacks any
18 support in precedent and must be rejected." *Garrison v. Colvin*, 759 F.3d 995, 1015 n. 18 (9th
19 Cir. 2014) (rejecting the argument that the Court should apply a standard lower than clear and
20 convincing in reviewing ALJ's evaluation of claimant's testimony where there was no
21 evidence of malingering). The Ninth Circuit's reasoning in *Garrison* is equally persuasive in
22 this context. See *Id.* Accordingly, the ALJ must provide "clear and convincing" reasons for
23 rejecting the uncontradicted opinion of either a treating or examining physician. *Lester*, 81
24 F.3d at 830. Even when a treating or examining physician's opinion is contradicted, that

1 opinion “can only be rejected for specific and legitimate reasons that are supported by
 2 substantial evidence in the record.” *Id.* at 830-31.

3 Here the ALJ determined that the medical opinions offered by plaintiff’s treating
 4 physician and treating rheumatologist regarding plaintiff’s symptoms and limitations are not
 5 persuasive. AR at 15-16. Instead, the ALJ found that the medical record supports no more
 6 than minimal limitations, as endorsed by the state agency reviewing physician. AR at 14
 7 (citing AR at 68-73). It is important to note that this physician neither examined nor treated
 8 plaintiff. *See* AR at 71; *see also* AR at 72 (finding insufficient evidence to establish a
 9 medically determinable mental impairment).

10 In contrast, plaintiff’s treating physician and treating rheumatologist, a doctor who
 11 specializes in treating conditions like fibromyalgia, both opine that plaintiff’s fibromyalgia
 12 causes functional limitations that significantly limit, if not preclude, plaintiff’s ability to
 13 perform various basic work related activities. *See* AR at 411, 480. As discussed previously,
 14 the opinions of treating physicians are to be given more weight than non-examining physicians.
 15 *Lester*, 81 F.3d at 830; *Orn*, 495 F.3d at 631. Hence, the ALJ’s rejection of these opinions in
 16 favor of the opinion of a non-examining physician is legal error. *See* *Orn*, 495 F.3d at 631.
 17 On remand, the ALJ should re-assess the medical opinions of plaintiff’s treating sources.

18 C. The ALJ’s Assessment of the Lay Witness Testimony

19 Plaintiff also argues that the ALJ erred by rejecting the lay witness testimony. Dkt. 11
 20 at 13-19. Similar to the ALJ’s treatment of the medical opinions of plaintiff’s treating
 21 physicians, the ALJ rejects the testimony of *all* of the lay witnesses who provided testimony
 22 regarding their observations of plaintiff during the relevant period in this claim. AR at 18-20.
 23 As with the ALJ’s assessment of plaintiff’s testimony, the Commissioner does not defend all of
 24 the reasons offered by the ALJ to reject the testimony of the lay witnesses. Dkt. 12 at 16-18.

1 Instead, defendant argues that that ALJ's overarching reason for rejecting the lay witness
2 testimony, that it was not supported by the objective longitudinal treatment record, is a
3 germane reason for discounting lay witness testimony. Dkt. 12 at 17 (citing *Bayliss v.*
4 *Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005)). Defendant further contends that because the
5 lay witness testimony is similar to plaintiff's own testimony, which the ALJ rejected, the ALJ
6 could reasonably discount the lay witness statements for the same reasons. Dkt. 12 at 17-18
7 (citing *Valentine v. Comm'r of the Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009)). This
8 Court disagrees.

9 The Court already has determined that the ALJ failed to provide clear and convincing
10 reasons supported by substantial evidence to reject plaintiff's testimony. *See supra*, section A.
11 Specifically, the Court overturned the ALJ's rejection of plaintiff's testimony on the basis that
12 it is not supported by the objective treatment record. *Id.* Similarly, in rejecting the lay witness
13 testimony, the ALJ repeatedly points to the lack of objective findings to corroborate the
14 various lay witness statements. *See* AR at 18 (rejecting the testimony of plaintiff's wife
15 because it is "inconsistent with the objective longitudinal record"), 19 (rejecting the testimony
16 of plaintiff's friend because her observations of plaintiff "are not consistent with the
17 longitudinal record"), 19 (rejecting the testimony of another friend because plaintiff's
18 allegations of muscle weakness are not borne out on examination and because there is "no
19 evidence of mental involvement" to support plaintiff's reports of cognitive limitations), 19
20 (rejecting the testimony of various family members regarding plaintiff's muscle weakness
21 because they are unsupported by examination findings, including nerve studies), 20 (rejecting
22 the testimony of plaintiff's brother regarding plaintiff's gastrointestinal symptoms because
23 plaintiff's "portrayal of himself to his friends and family members is not supported by the
24 extensive objective examinations and objective medical evidence"), 20 (rejecting the testimony

1 of plaintiff's father because his allegations are inconsistent with the "longitudinal record"). As
2 discussed in greater detail previously, this rationale fails in the context of the ALJ's
3 determination that plaintiff's fibromyalgia is a medically determinable impairment. *See supra*,
4 section A. For this reason, inconsistency with the objective longitudinal treatment record is not
5 a legally sufficient reason to reject the lay witness testimony in this case because this reason is
6 not supported by substantial evidence. *See also Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th Cir.
7 2009) (noting that an ALJ may not discredit "lay testimony as not supported by medical
8 evidence in the record").

9 Additionally, the ALJ relies on other reasons to reject the lay witness that are legally
10 insufficient. *See e.g.* AR at 18 (rejecting the testimony of plaintiff's wife in part because
11 plaintiff did not obtain a sleep center study), 19 (rejecting the testimony of various family
12 members regarding plaintiff's cognitive difficulties because "no such complaints were ever
13 brought to the attention of any medical professional and no clinician ever noted such
14 significant cognitive symptoms" and because plaintiff never sought assistance for his mental
15 symptoms), 19 (rejecting the testimony of a family member regarding plaintiff's diminished
16 physical capacity because several treating physicians encouraged plaintiff to engage in
17 exercise). This Court already has determined that these reasons are not supported by
18 substantial evidence in the record. *See supra*, section A.

19 Further, the ALJ rejected the statements of two lay witnesses regarding plaintiff's
20 gastrointestinal difficulties because plaintiff's gastroenterologist Sang Kim, M.D.,
21 characterized plaintiff's bathroom habits as "pathological." AR at 19; *see also* AR at 17-18.
22 The ALJ's reliance on this factor, however, leads the Court to conclude that the ALJ
23 misunderstands Dr. Kim's use of the term "pathological." When used in a medical setting, the
24 term pathological is commonly understood to mean "relating to or dealing with disease".

1 Oxford English Dictionary Online (2014), <http://www.oed.com/view/Entry/138800?>
2 redirectedFrom=pathological& (accessed February 11, 2015). In this context, the term
3 pathological does not imply that a patient is malingering or feigning symptoms or that the
4 patient's symptoms necessarily have a psychological origin. *See Id.* For these reasons, the
5 ALJ's assessment of the lay witness testimony in this case is reversed and remanded for further
6 administrative proceedings.

7 D. This Matter Should be Remanded for Further Administrative Proceedings

8 The Court may remand this case “either for additional evidence and findings or to
9 award benefits.” *Smolen*, 80 F.3d at 1292. Generally, when the Court reverses an ALJ’s¹
10 decision, “the proper course, except in rare circumstances, is to remand to the agency for
11 additional investigation or explanation.” *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir.
12 2004) (citations omitted). Thus, it is “the unusual case in which it is clear from the record that
13 the claimant is unable to perform gainful employment in the national economy,” that “remand
14 for an immediate award of benefits is appropriate.” *Id.*

15 Benefits may be awarded where “the record has been fully developed” and “further
16 administrative proceedings would serve no useful purpose.” *Smolen*, 80 F.3d at 1292; *Holohan*
17 *v. Massanari*, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded
18 where:

19 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the
20 claimant’s] evidence, (2) there are no outstanding issues that must be resolved
21 before a determination of disability can be made, and (3) it is clear from the
record that the ALJ would be required to find the claimant disabled were such
evidence credited.

22 *Smolen*, 80 F.3d 1273 at 1292; *McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir.
23 2002).

Here, there are outstanding legal issues that must be resolved before a determination of disability can be made including the credibility of plaintiff's testimony and the testimony of various lay witnesses as well as the weight to be given to the medical opinions of plaintiff's treating sources. As discussed previously, the ALJ bases much of his decision below on the lack of objective medical findings in this case. In the context of plaintiff's diagnosis of fibromyalgia, this reasoning fails and should not be repeated on remand. If the ALJ determines on remand that there is insufficient evidence to allow for the proper assessment of plaintiff's symptoms and limitations, the ALJ is reminded that he has the duty "to fully and fairly develop the record." *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001) (citations omitted). Additional development of the record may be accomplished by recontacting plaintiff's treating sources, ordering a consultative examination, procuring the assistance of a medical expert in rheumatology, or some combination thereof.

VIII. CONCLUSION

For the foregoing reasons, the Court recommends that this case be REVERSED and REMANDED to the Commissioner for further proceedings pursuant to sentence four of 42 U.S.C. § 405(g) and not inconsistent with the Court's instructions. A proposed order accompanies this Report and Recommendation.

Objections to this Report and Recommendation, if any, should be filed with the Clerk and served upon all parties to this suit by no later than **February 27, 2015**. Failure to file objections within the specified time may affect your right to appeal. Objections should be noted for consideration on the District Judge's motion calendar for the third Friday after they are filed. Responses to objections may be filed within **fourteen (14)** days after service of objections. If no timely objections are filed, the matter will be ready for consideration by the District Judge on **March 6, 2015**.

This Report and Recommendation is not an appealable order. Thus, a notice of appeal seeking review in the Court of Appeals for the Ninth Circuit should not be filed until the assigned District Judge acts on this Report and Recommendation.

DATED this 13th day of February, 2015.

James P. Donohue

JAMES P. DONOHUE
United States Magistrate Judge